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No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

WALLACE WOOTEN,
INDIVIDUALLY AND AS FATHER AND NEXT FRIEND OF
AUGUST MARK WOOTEN, A MINOR,

Petitioner,

v.

AMERICAN MOTORISTS INSURANCE COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTION PRESENTED

Is the wrongful death remedy announced in *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 26 L. Ed. 2d 339, 90 S. Ct. 1772 (1970), applied only where there exists a breach of the warranty of seaworthiness or is it also available in cases involving negligence, especially negligence unconnected with the operation of a vessel?

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PARTIES

The petitioner was the original defendant in the trial court. The Respondent was his homeowner's insurer who was originally named as an additional defendant, but against whom the petitioner cross-claimed to establish insurance coverage.

OPINION BELOW

The pertinent decision of the District Court is neither officially nor unofficially reported and is made a part of the appendix hereof; the opinion of the Court of Appeals, reported at 681 F.2d 712, is similarly made a part of the appendix hereto.

JURISDICTION

The opinion of the United States Court of Appeals for the Eleventh Circuit was entered as judgment on July 26, 1982. This Court's jurisdiction is invoked under 28 United States Code § 1254(1).

STATEMENT OF THE CASE

In this wrongful death action, the deceased, a seventeen-year-old, died while on a summer sailing trip to the Bahamas. The deceased, his seventeen-year-old friend, and his friend's father, the owner of the yacht, left Ft. Lauderdale and sailed to the Island of Abaco. At Marsh Harbour, Abaco, the owner left the yacht in the custody of the deceased and his son and returned to the United States. The arrangement was that the boys would sail the boat south to Nassau where they would all meet again. The boys continued south to Little Harbour where they anchored and went by dinghy with new acquaintances to dive for lobster in a deep hole. The deceased was able to free dive several times to a depth of about forty-five feet, but drowned as a result of a syndrome known as "shallow water black-out" brought on in part by excessive hyperventilation just before diving.

Suit was brought in admiralty under the Death on the High Seas Act, 41 Stat. 537, 46 U.S.C. § 761, and against

the homeowner's policy for personal negligence. At the Pre-trial Conference, the plaintiff was permitted to amend his complaint to include a cause of action under general maritime law for "loss of society damages". The defendant, the petitioner here, cross-claimed against his homeowner's insurance company, the respondent here, which was named as a party defendant in the case under Florida procedure. The deceased was found to be a member of the crew but the case was not prosecuted as a Jones Act case and, in his Findings of Fact, the trial judge further found coverage under the homeowner's policy to the extent of the pecuniary damages. He went on to find that that same negligence produced a condition of unseaworthiness in the vessel for which he awarded "loss of society damages" which he found to be not covered by the homeowner's policy because of the policy exclusion of vessels of that size.

Two appeals were subsequently taken. In the first, the Fifth Circuit remanded the cause to the District Court for trial on the issue of coverage, and the second was taken by the defendant from an adverse summary judgment on the issue of coverage. The petitioner contended that the homeowner's policy covered personal negligence unconnected with the operation of a vessel, and if an award of "loss of society damages" flowed from that same negligence then those damages should be covered by the policy.

The case was tried in those years between *Sea-Land Services, Inc. v. Gaudet*, 414 U.S. 573, 94 S. Ct. 806 (1973), *rehearing denied*, 415 U.S. 986 (1974), and *Mobil Oil Corporation v. Higginbotham*, 436 U.S. 617, 56 L. Ed. 2d 339, 98 S. Ct. 2010. At that time, it was widely assumed that the remedy announced in *Moragne, supra*, had no territorial bounds. Although the death

occurred in Bahamian waters, it was tried as if *Moragne* applied to it and that assumption must now be considered the law of the case.

REASONS FOR GRANTING WRIT OF CERTIORARI

In this case, the Eleventh Circuit Court of Appeals held that the wrongful death remedy announced in *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 26 L. Ed. 2d 339, 90 S. Ct. 1772 (1970), could be invoked only as a consequence of breaches of the warranty of seaworthiness and could not be applied in causes of action for negligence. That conclusion is logically inconsistent with all of the cases that have followed *Moragne, supra,* and should be addressed by certiorari to this Court.

It is, first, mildly inconsistent that *Moragne, supra,* could be understood or construed as having announced a wrongful death remedy which would have nothing to do with negligence. The specific question addressed in *Moragne* was whether there was a wrongful death action under general maritime law which encompassed unseaworthiness as a theory of liability. The answer was yes. But *Moragne* should be logically understood to include a wrongful death action brought either upon unseaworthiness or negligence.

The Eleventh Circuit relied on the case of *Ivy v. Security Barge Lines, Inc.*, 606 F.2d 524 (5th Cir. 1979), *cert. denied,* 446 U.S. 956, 100 S. Ct. 2927, 64 L. Ed. 2d 815 (1980), but *Ivy, supra,* is distinguishable because it involved the death of a Jones Act seaman. If *Ivy* did apply, it would, perhaps, be not so mildly inconsistent that the shipowner would escape nonpecuniary damages in admiralty if he is found to be positively negligent that

damages would be awarded if his ship is found to be unseaworthy when a Jones Act seaman dies in territorial waters. But *Ivy* does not stand for the proposition that there is no wrongful death remedy for negligence, it merely states that if the decedent is a Jones Act seaman, then the wrongful death provisions of the Jones Act, 41 Stat. 1007, 46 U.S.C. § 588, must be applied. The Jones Act is limited to specific beneficiaries of a specific class of decedents.

The ultimate question is whether *Moragne* creates a wrongful death action which is restricted to unseaworthiness and does not encompass negligence as a theory of recovery. A reading of the case will not permit that construction. The first half of the opinion is devoted to a historical discussion of the emergence of wrongful death remedies. In overruling *The Harrisburg*, 119 U.S. 199, 30 L. Ed. 358, 7 S. Ct. 140 (1886), this Court was establishing a remedy for wrongful death. That remedy was so extensive that it encompassed unseaworthiness as a theory of liability, but the import of the decision was that a right of action for wrongful death, in the tradition of the emergence of such actions, was established under general maritime law.

The fact that *Moragne* views the right of action in this broad and complete way can be seen in references througout the opinion, but at 398 U.S. 399 one can find the following language relating to the conceptual relationship of negligence to unseaworthiness:

> Nonseamen on the high seas could generally recover for ordinary negligence, but even this was virtually denied to seamen under the peculiar maritime doctrine of *The Osceola*, 189 U.S. 158, 47 L. Ed. 760, 23 S. Ct. 483 (1903).

Simply stated, there is not one suggestion in *Moragne* that the maritime duties alluded to do not embrace negligence as a cause of action under this remedy. See the holding at 398 U.S. 409:

> We accordingly overrule *The Harrisburg*, and hold that an action does lie under general maritime law for death caused by violation of maritime duties.

Moragne has been so understood since. *See Law v. Sea Drilling Corporation*, 523 F.2d 793 (5th Cir. 1975), quoting the understanding of Gilmore & Black, *The Law of Admiralty* (2d ed. 1975), pages 369-70:

> The remedy provides recovery for deaths caused by negligence as well as unseaworthiness although in the latter case the decedent must have been a person (*e.g.*, a Jones Act seaman) entitled to the warranty of seaworthiness.

The Court in *Nelson v. United States*, 639 F.2d 469 (9th Cir. 1980), a case dealing primarily with distribution of the risk of injury to workmen between the government and its contractors, also clearly understood *Moragne* to apply in cases of negligence. See the opinion at page 473:

> We hold that the need for uniformity in maritime wrongful death actions requires extension of *Moragne* to cover claims based on negligence, to the exclusion of state wrongful death statutes.

Nothing in the case of *Mobil Oil Corporation v. Higginbotham*, 436 U.S. 617, 56 L. Ed. 2d 339, 98 S. Ct. 2010 (1978), is contrary to the proposition advanced here. In fact, *Higginbotham* is in support of the petitioner's view. In that case, loss of society damages were denied to nonseamen injured in the crash of a helicopter solely because the accident occurred outside the territorial waters of the United States and, therefore, were

specifically encompassed under the Death on the High Seas Act, 41 Stat. 537, 46 U.S.C. § 761.

There is nothing in *Higginbotham* to suggest that, had the accident occurred within the three mile limit, "loss of society damages" would not have been upheld under *Moragne* for negligence unconnected with the operation of a vessel. *Higginbotham* settled the issue as to the territorial nature of the *Moragne* remedy, but the place of the death in this case, for our purposes now, is of no consequence.

There is a great need for uniformity in this area; it simply does not occur by itself, it must be forged. Traditional maritime activity is not just limited to seamen and vessels. It now involves helicopters and seaplanes and thousands of over the water flights per day, divers and men at work on wave suppressors and in caissons. Admiralty, after *Moragne*, no longer adopts widely varying state wrongful death statutes. For the sake of uniformity, which is essential to justice, all doubt should be removed about the basis of recovery under this new wrongful death remedy. It is as remedy for wrongful death for breaches of maritime duties, including negligence and unseaworthiness, that applies within territorial waters.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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